UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC, Plaintiff, -against- OPPIDAN, INC., Defendant.	Index No.: 11-CV-1460(AJN)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In opposition, Plaintiff does not cite a single case to refute that dismissal is appropriate. As the law is clear and unequivocal, the opposition provides cases that address other aspects of law applicable to other industries. However, in New York, the Legislature specifically protects the field of real property, the ethics of the real estate brokerage business and the people who participate in the industry. The law is controlled by the Real Property Law and the cases cited by Defendant that discuss the statute. A person or entity that engages in actions involving the sale of real property must be licensed. The necessity for different rules and protections for different industries is highlighted by Plaintiff's attachment of its Membership Agreement with Financial Industry Regulatory Authority ("FINRA") that regulates PrinceRidge's business with securities.

Likewise, just as PrinceRidge's FINRA license carries no authority in this action, the cases cited in opposition also do not address the facts of this case. Plaintiff provides definitions and cases from other areas of the law to attempt to draw similarities and defeat dismissal. However, it is not appropriate to apply case law that addresses other professions and different facts when law exists, as cited throughout Defendant's moving papers, that is squarely on point.

It is respectfully suggested that PrinceRidge's failure to produce a single case permitting recovery of a commission for the sale of real property from an unlicensed broker is because the law precludes such recovery. There is no question the underlying engagement was for the sale of property. It is undisputed that PrinceRidge was not licensed, acted to sell real property, and accordingly, the Complaint must be dismissed.

STATEMENT OF FACTS

The Court is respectfully referred to the Defendant's attached Rule 56.1 Statement

ARGUMENT

THE EVIDENTIARY BURDEN FOR SUMMARY JUDGMENT

The non-moving party must offer such proof as would allow a reasonable juror to return a verdict in his favor. Graham v. Long Island R.R., 230 F.3d 34, 38 (2nd Cir. 2000); (citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). When that proof is slight, summary judgment is appropriate. Id. In this action, plaintiff is not even able to offer "slight" proof. The evidentiary material before this Court provides just such a record. Accordingly, summary judgment is appropriate. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 381 (2007).

POINT I

PLAINTIFF DOES NOT RAISE ANY MATERIAL QUESTION OF FACT OR LAW THAT OPPOSES THE REASONS THE COMPLAINT MUST BE DISMISSED

In opposition, plaintiff provides a litany of cases covering areas of law not at issue in this case. In Northeast Gen. Corp. v. Wellington Adv., 82 N.Y.2d 158 (N.Y. 1993), the primary case cited in opposition, the underlying parties entered into a merger agreement for the purchase of a company. Real property is not discussed in the Court's decision and real property was not the subject of the transaction between those parties. Northeast Gen. Corp., 82 N.Y.2d at 161. Train v. Ardshiel Assoc., Inc., 635 F. Supp. 274 (S.D.N.Y. 1986) involved the purchase of a company for cash and notes. Train, 635 F. Supp. 274 at 276. The 1933 case of Polo v. Lordi, 261 N.Y. 221 (NY 1933), involved a real estate broker who was employed to procure a building loan for his employer's property. Not only was the plaintiff in Polo a real estate broker, his compensation was not completely commission based upon a percentage of the loan amount. Although plaintiff was to receive one percent of the loan amount (if successful), the employee was to be paid a separate fee to procure bids, consult with contractors, and represent the employer in procuring a loan. In Polo, not only was the plaintiff a real estate broker, the aspect of services provided that did not directly relate to the sale of real estate were not calculate upon the sale price of property. Although Polo does not apply to the facts of the instant matter, it is a nice example of a real estate broker obtaining compensation separate and apart from the sale of property – underscoring the point that PrinceRidge's services were directly intertwined with the sale of real property and based solely upon the sale of the Properties.

It is unclear why the opposition cited Feldbau v. Klarnet, 109 Misc.2d 32 (Queens Cty. Civil Ct. 1981) and Minichiello v Royal Business Funds Corp., 18 N.Y.2d 521 (N.Y. 1966), as the holdings of those cases clarify that dismissal is appropriate. The Feldbau Court set forth that section 442-d of the Real Property Law "broadly covers 'compensation for services rendered' regardless of what the parties may call it." Feldbau v. Klarnet, 109 Misc.2d at 35. Feldbau held that the "services to defendant in the buying of the property… falls within the ambit of section 442-d of the Real Property Law and plaintiff, therefore, may not maintain this cause of action." Feldbau, 109 Misc.2d at 35. As discussed in Feldbau, the Minichiello Court addressed the Statute of Frauds in connection with the purchase of convertible debentures as well as stock. Minichiello, 18 N.Y.2d at 521. As noted by the Court in Feldbau, "[t]he determination of the Court of Appeals in Minichiello that a finder was included within the definition of one seeking to recover 'compensation for services rendered,' supports the conclusion that a finder is included within those same words when used in section 442-d of the Real Property Law.

Defendant's moving papers provided current case law that specifically addresses the rules and regulations applicable to the present matter. Because there is no law to support Plaintiff's claims, the opposition was left only to attempt to find some distinctions with the cases on point. However, the undisputed facts do not support the distinctions and the law supporting dismissal is directly applicable to the underlying sale of real property described in the record.

As set forth in the original moving papers, where services are rendered for a purchase of real property, the broker must be licensed. Levinson v. Genessee Assocs., 172 A.D.2d 400 (1st Dept. 1991). The opposition attempts to distinguish Levinson by setting forth that the First Department relied upon "the negotiation of the property". (Memo in Opp., p. 8-9). A further review of the Levinson decision confirmed that the Court does not consider "negotiation". That is a distinction drawn only in Plaintiff's papers. To be clear, in granting dismissal of the plaintiff's claims, the Appellate Division held "[p]laintiff has not even alleged, let alone demonstrated that the underlying transaction was actually more than a straight forward purchase of real property, or that the services purportedly rendered by her were for any purpose other than to facilitate defendants' purchase." Id. In any case, PrinceRidge directed "[p]otential buyers [to] submit bids on the entire portfolio, subsets of the portfolio, or individual assets…" by directly contacting PrinceRidge (Defendant's Reply 56.1 Statement at ¶¶ 20, 42). Here, the record is clear that Plaintiff set out to sell the Properties and the services rendered were for the purpose of facilitating a purchase. (Defendant's Reply 56.1 Statement at ¶¶ 15, 19). Plaintiff's interpretation of the Levinson decision is not found in the Court's holding and cannot be the basis to deny summary judgment.

Likewise, Plaintiff's interpretation of Feldbau, cannot be found in the Court's decision. Like Levinson, the Feldbau Court does not discuss "negotiations" and held that because the investor was not a licensed real estate broker, under N.Y. Real Prop. Law § 442-d he was not permitted to maintain a cause of action against the buyer to collect a finder's fee. Feldbau v. Klarnet, 109 Misc.2d 32, 37 (Queens Cty. Civil Ct. 1981). Again, Plaintiff's argument that the Court's decision was based upon a "negotiation" is not found in the Court's opinion.

The Court's holding and not Plaintiff's speculation must also be the only law applied from the Second Department's decision in Panarello v. Segallo, 6 A.D.3d 515 (2nd Dept. 2004). The Second Department held "Real Property Law § 440 (1) defines a real estate broker as anyone who 'lists for sale, sells . . . exchanges, buys or rents, or offers or attempts to negotiate a sale . . . or interest in real estate.' **Where the dominant feature of the transaction at issue is the transfer of real property, one who does not have a real estate broker's license is barred from collecting a fee for endeavors in the nature of brokerage services**". Panarello v. Segallo, 6 A.D.3d at 516 (emphasis added). It is clear from the words of the Panarello Court as well that "negotiation" is not a dispositive factor. In fact, as noted above, "attempts to negotiate" is just one factor encompassed by Real Property Law § 440 (1). The Second Department is clear that where the dominant feature is the transfer of real property a non-licensed broker is barred from collecting a fee. Id. Where a party cannot "demonstrate, that the underlying transaction was anything more than the purchase and sale of real property, or that the services rendered were for any purpose other than facilitating that purchase and sale" the claim must be dismissed pursuant to Real Property Law § 442-d" even where the collection of the fee was labeled a "finder's fee". Futersak v. Perl, 84 A.D.3d 1309, 1311 (2nd Dept. 2011).

To the extent the aforementioned cases leave any doubt, Defendant looks back at the statute addressed and applicable to this case. The unambiguous language of the statute cannot be left to plaintiff's unilateral interpretation. "No person, copartnership, limited liability company or corporation shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose." NY CLS Real P § 442-d (2012). "Negotiating a loan upon any real estate" is one set of actions by which an individual or corporation will be held under the statute, but the law, as set forth above, is not limited to Plaintiff's definition inclusive only of "negotiate". The statute is strictly construed and compliance is mandatory. American Property Consultants, Ltd. v. Walden Lisle Assocs. Ltd. Partnership, 1997 U.S. Dist. LEXIS 9984, *7 (S.D.N.Y. 1997). The New York Courts are clear, where the dominant feature is the real estate, 442-d bars a non-licensed broker from recovery.

Although the opposition is replete with unnecessary attacks on Oppidan, that it seeks to skew the facts, in order to accept Plaintiff's story it is necessary to ignore the undisputed facts that conclusively support a deal for real estate. Despite the attempt in opposition to make it appear like additional services were provided, the actual services provided by Plaintiff were to sell real property. Moreover, there is no dispute that the dominant feature of the underlying sale was real property – in fact, it was the only feature. That undisputed fact is highlighted by the testimony of the Plaintiff witnesses who confirmed they ultimately set out to sell the Properties, (Defendant's Reply 56.1 Statement at ¶¶ 15, 16, 23); is cemented by the Contract terms; and Plaintiff's emails for listings. (Defendant's Reply 56.1 Statement at ¶¶ 7, 9, 10, 15, 19, 32, 35).

The Contract avoids any possible doubt that the dominant feature of the underlying engagement was the sale of the properties. To be clear, there is no suggestion that PrinceRidge was entitled to compensation of any kind unless the properties were sold. (Tonorezos Declaration in reply, ¶ 3, Exh. "A"). Compensation was based upon a commission, to be paid at closing, in an amount equal to 1.875% of the sales price. (Defendant's Reply 56.1 Statement at ¶¶ 9, 10). Moreover, the Contract dictates that "PrinceRidge will appear on the closing statement and the Success Fee shall be disbursed from proceeds at the closing. The Success Fee shall be earned and paid based on the sales price of any assets sold within the portfolio." Id. As the Contract is for the sale of the properties as opposed to any other service, it does not provide for any other terms of compensation other than by way of sale of the Properties. (Tonorezos Reply Declaration, ¶ 3, Exh. "A"). There is no material question of fact that could establish anything other than the 16 properties were the dominant feature of the transaction at issue and that PrinceRidge was attempting to collect a fee for services facilitating the purchase and sale of the properties. The Contract attaches a list of the properties that are to be sold by PrinceRidge. (Defendant's Reply 56.1 Statement at ¶ 7).

The reasons dictating dismissal remain undisputed. New York Law does not permit an unlicensed individual or corporation to sell real estate. Plaintiff was not licensed. Plaintiff was involved with the sale of real property. The moving papers provided current case law directly on point. The opposition could not refute the applicable law.

Defendant acknowledges that the opposition extends great effort to portray Oppidan as a company seeking to "conduct an end around" and suggests "that the Court should not condone Oppidan's actions." (Memo. in Opp. – Conclusion, p. 16). First, as already addressed throughout the various motion papers, Plaintiff did not provide any services that entitled it to millions of dollars in commissions – whether in fairness or in law. However, notwithstanding that Plaintiff did not perform services in support of its breach of contract claim, it is black letter law that Plaintiff's claim must be dismissed under the applicable law of the State of New York. A quote taken directly from a case cited by Plaintiff is appropriate to consider in light of Plaintiff's "fairness" undertones: "This Court may sense a sympathetic impulse to balance what it may view as the equities of a situation such as this. The hard judicial obligation, however, is to be intellectually disciplined against that tug. Instead, courts must focus on the precise law function reposed in them in such circumstances, which is to construe and enforce the meaning and thrust of the contract of the parties, not to purify their efforts." Northeast Gen. Corp. v. Wellington Adv., 82 N.Y.2d at 164.

It is clear. New York has laws that preclude recovery by a non-licensed broker engaged in the sale of real property. It is respectfully suggested that this Honorable Court not look beyond the applicable law that holds for the dismissal of Plaintiff's Complaint.

POINT II

THE BREACH OF THE IMPLIED COVENANT CLAIM MUST BE DISMISSED

In opposition, Plaintiff asserts that "Oppidan's attempt to hide its sale of the properties" constitutes the 'additional facts' necessary to support a claim for a breach of the implied covenant of good faith and fair dealing ("Implied Covenant") (Memo. in Opp., p. 13). Without a single case, Plaintiff attempts to rehabilitate its claim with purported "additional facts". However, New York law does not allow a duplicative claim or a claim based on an unenforceable contract to establish this cause of action. PrinceRidge does not address the clear and controlling law that dictates the claim must be dismissed for two separate and independent reasons.

The Second Cause of Action is Duplicative and Must be Dismissed.

PrinceRidge argues that the Implied Covenant claim is based on "additional facts" in an attempt to circumvent that New York "does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim is asserted." Ely v. Perthuis, 2 Civ. 1078 (DAB), 2013 U.S. Dist. LEXIS 14952 (S.D.N.Y. 2013) (**"Although Plaintiff argues the covenant claim is based on different facts than the contract claim, this Court disagrees. Both claims relate to the same events; therefore, the breach of covenant claim must be dismissed as duplicative."**) (emphasis added); Harris v. Provident Life & Accident Ins. Co., 310 F.3d 73, 81 (2nd Cir. 2002) (no separate cause of action for breach of the Implied Covenant when a breach of contract claim is also pled.); Blessing v. Sirius XM Radio Inc., 756 F. Supp. 2d 445, 460 (S.D.N.Y. 2010) (the conduct here is the same for both claims.); Corazzini v. Litton Loan Servicing LLP, 2010 U.S. Dist. LEXIS 27398 (N.D.N.Y 2010) (Plaintiff repeats the allegations that comprise breach of contract claim – non-compliance with a term of their contract.); Lotz v. Charles Crosby & Son, Inc., 2009 U.S. Dist. LEXIS 60265 (N.D.N.Y July 14, 2009) (Implied Covenant is based on the same conduct as allegations for breach of contract.); B. Lewis Prods. v. Angelou, 2005 U.S. Dist. LEXIS 9032 (S.D.N.Y. 2005).

PrinceRidge fails to show that the Implied Covenant is based on different facts. Both claims are based upon the same facts and seek identical damages. (Compl. ¶¶ 10-21). Plaintiff's attempt to circumvent the law by referencing "additional facts" in opposition fails to remedy that Princeridge's claim based on the Implied Covenant is duplicative of its breach of contract claim.

The Prerequisite of an Enforceable Underlying Agreement is Absent.

Even if the Plaintiff only brought a cause of action based on the Implied Covenant, Plaintiff's claim fails as the agreement is unenforceable, and therefore, as a matter of law, there can be no breach of the Implied Covenant. Ely v. Perthuis, supra (Because Plaintiff's contract is unenforceable, her breach of covenant claim is barred.); Kargo, Inc. v. Pegaso PCS, S.A., 05 Civ. 10528 (CSH), 2008 U.S. Dist. LEXIS 81888 (S.D.N.Y. 2008) (A claim for breach of the Implied

Covenant is dependent upon the existence of an enforceable contract.); Stillman v. InService Am., Inc., 05 Civ. 6612 (WHP), 2008 U.S. Dist. LEXIS 40321, *6-7 (S.D.N.Y. 2008) (There can be no breach of good faith and fair dealing when there is no valid and binding contract. . . because the agreement is not enforceable, Plaintiff's good faith and fair dealing claim is dismissed.).

Plaintiff fails to distinguish the ample case law cited by Oppidan and, moreover, fails to provide even a single case suggesting that an Implied Covenant claim could be viable based on an unenforceable contract. Instead, PrinceRidge reiterates its claim that Plaintiff acted merely as a "finder" and not a "broker". As noted, the alleged agreement is not enforceable. Therefore any claim for breach of the Implied Covenant must, as a matter of law, be dismissed.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that its Rule 56 motion be granted in its entirety and each of plaintiff's causes of action be dismissed; and that the Court grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 15, 2013

Respectfully submitted,

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